Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for Decision

Jean-Michel Chénier,

complainant,

and

Communications, Energy and Paperworkers Union of Canada,

respondent,

and

Expertech Network Installation Inc.,

employer.

Board File: 27544-C
Neutral Citation: 2011 CIRB **596**
June 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Claude Roy, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*). A hearing was held in Montréal on October 19 and 20, 2010, following a pre-hearing conference on May 11, 2010.

Appearances

Mr. Olivier Bergeron, for Mr. Jean-Michel Chénier;

Mr. Maxime Lazure-Bérubé, for the Communications, Energy and Paperworkers Union of Canada;

Mr. Aaron Z. Makovka, for Expertech Network Installation Inc.

I–Nature of the Complaint

[1] This complaint was filed on June 2, 2009, by Mr. Jean-Michel Chénier (the complainant), alleging that the Communications, Energy and Paperworkers Union of Canada (CEP or the union) breached its duty of fair representation under section 37 of the *Code* when it abandoned the grievance challenging his dismissal by Expertech Network Installation Inc. (the employer) on August 15, 2007.

[2] The complainant alleges that the union acted in a manner that was arbitrary and in bad faith when it decided to abandon the grievance. He also alleges that the union's lack of communication deprived him of his right to appeal to the union's higher authorities. He is asking that the grievance be referred to arbitration. Alternatively, if the grievance is not sent to arbitration, he is claiming damages.

II–Background and Facts

[3] The complainant testified at the hearing and also called Mr. Richard L'Heureux, a technician with the employer and the president of CEP, Local 8284, as well as Mr. Yves Ménard, a technician and the chief steward of the local union, who is in charge of handling grievances at the first level of the grievance procedure. The union called Mr. Alain Portelance, the former vice-president of the local union and an employee and national representative of CEP, and Mr. François Singer, a technician and the executive vice-president of CEP, Local 8284. The employer did not call any witnesses or make any submissions at the hearing. It limited itself to filing written submissions with the Board.

[4] At the Board's direction, the parties, including the employer, produced a document at the hearing that set out the admitted facts of the case on which they were in agreement, which reads as follows:

> 1. Expertech (hereinafter "the employer") is a service provider that is responsible for the supply requirements of Bell Canada's network;

2. The Communications, Energy and Paperworkers Union of Canada (hereinafter "CEP") is the certified bargaining agent for all employees of the employer in Canada working in connection with "the installation of communications and related equipment" (CIRB order no. 8285-U);

3. On June 11, 2007, Mr. Jean-Michel Chénier (hereinafter "the complainant") was hired by the employer as a Class 3 technician on a temporary, part-time employee basis within the meaning of the collective agreement binding the employer and CEP;

4. As a new employee, the complainant was subject to a probationary period of six months. During that time, he was on probation pursuant to article 9.01(c) of the collective agreement between the employer and CEP;

5. On August 15, 2007, the employer terminated the complainant's employment;

6. On August 31, 2007, CEP filed grievance X82-085-D on behalf of the complainant to challenge the termination of his employment with the employer;

7. That same day, the meeting at the first level of the grievance procedure was held, and was attended by the complainant, Mr. Yves Ménard, Secretary-Treasurer of CEP, Local 8284, and Mr. Gagné, the employer's representative;

8. On September 14, 2007, the employer dismissed grievance X82-085-D at the first level of the grievance procedure;

9. On September 19, 2007, CEP took the first steps toward taking grievance X82-085-D to the second level of the grievance procedure;

10. On November 15, 2007, a labour relations meeting took place to discuss grievance X82-085-D at the second level of the grievance procedure. That meeting was attended by the complainant, union representatives Alain Portelance, Yves Ménard and François Singer, and employer representatives Sylvain Cloutier and Stéphane Martel;

11. On January 2, 2008, the employer advised CEP that it was maintaining its position and dismissing grievance X82-085-D at the second level of the grievance procedure;

12. On or around January 23, 2008, CEP initiated the arbitration procedure for grievance X82-085-D by sending the employer a notice of arbitration;

13. On July 16, 2008, CEP withdrew grievance X82-085-D;

14. On June 2, 2009, the complainant filed this complaint with the Canada Industrial Relations Board pursuant to section 37 of the *Canada Labour Code*.

(translation)

[5] During his first days on the job, the complainant was given occupational health and safety training and training on driving a truck. He then started work on the road with a Class 1 technician. In July 2007, he filed a grievance, at the suggestion and on the advice of Mr. L'Heureux, with respect to the interpretation of the collective agreement provision regarding reimbursement for the cost of work boots required by the employer.

[6] In early August 2007, he started mandatory training for all Class 3 technicians. Such training normally takes three months. According to his testimony, he performed the tasks he was given with ease and efficiency. Since the complainant had experience in wire splicing, the employer had apparently given him a premium over and above the base hourly rate when he had been hired. He indicated that his instructor thought he was excellent.

[7] During the second week of training, on August 15, 2007, at about 3:10 p.m., his supervisor handed him a letter indicating that he was dismissed effective immediately and would receive a full week's pay without having to report for work. The letter stated the reason for his dismissal as follows:

> Unfortunately, you have failed to demonstrate the skills needed to carry out the duties of the position during the probationary period.
>
> (translation)

[8] The complainant alleges that his supervisor, Mr. Daigneault, said when he handed him the letter that he had warned him not to ask questions and that the real reason for his dismissal was because of the grievance that he had filed regarding reimbursement for the cost of the work boots. The Board lacks jurisdiction to address the truth of this evidence, a matter that comes under the grievance arbitrator's jurisdiction. However, the employer allowed the grievance in question in December 2007 and agreed to reimburse the complainant for the cost of the boots.

[9] On August 16, 2007, the complainant called his shop steward, Mr. Yves Ménard, and on August 21, 2007, a meeting—which according to Mr. Ménard was to gather facts—was held at a restaurant near the complainant's home in Vaudreuil. Mr. Ménard explained the grievance procedure to the complainant, since the complainant, who was only 23 years of age, was unfamiliar with the process. He explained that he was in charge of presenting the grievance at the first level of the grievance procedure and that Mr. François Singer would be presenting it at the second level. Since he had prepared the grievance form in advance, he had the complainant sign it at the meeting. He showed him article 9 of the collective agreement and, according to his testimony, pointed out that the union rarely proceeded with grievances involving probationary employees. He even had the complainant read article 9.01(c) in this regard.

[10] The grievance was presented to the employer on August 31, 2007. The complainant attended the meeting, which lasted between 20 and 30 minutes. In his testimony, Mr. Ménard stated that he had wanted "to know why the employer considered the complainant unsuitable for the job" (translation). The complainant did not ask any questions at that meeting.

[11] On September 14, 2007, the employer dismissed the grievance. On September 19, 2007, Mr. Ménard asked CEP's national representative, Mr. Portelance, to present the grievance at the second level, since management's response was not satisfactory. Mr. Portelance sent the employer a request to that effect on September 21, 2007.

[12] On November 13, 2007, the complainant called Mr. Ménard to check on the progress of his case. Mr. Ménard testified that he could not recall that telephone call, nor two other calls allegedly made to him by the complainant in early January 2008.

[13] On November 15, 2007, Mr. Portelance met with the employer at the second level of the grievance procedure. As indicated in the admitted facts, he was accompanied by the complainant and union representatives Yves Ménard and François Singer. Mr. Portelance testified that, at that meeting with the employer, he had been in "listening mode" (translation).

[14] In a letter dated January 2, 2008, the employer informed Mr. Portelance that it was maintaining its position, stating the following:

> The company does not consider that it violated the collective agreement, since Mr. Chénier failed to demonstrate the skills needed during his probationary period. For this reason, the grievance is dismissed.
>
> (translation)

[15] On January 8, 2008, Mr. Portelance forwarded the employer's response to Mr. Ménard, indicating that "we will await your position with regard to pursuing the matter" (translation), since according to what Mr. Portelance stated at the hearing, it is the local union that decides whether or not to continue to pursue a grievance.

[16] On January 23, 2008, Mr. Singer asked Mr. Michel Ouimet, Vice-President of CEP-Québec, to initiate the expedited arbitration procedure, sending a copy of his request to Mr. L'Heureux and Mr. Portelance. On January 29, 2008, Mr. Portelance sent a notice of arbitration to Mr. Sylvain Cloutier, the employer's representative, and provided the names of three potential arbitrators. At the hearing, he stated that this was standard procedure in all cases.

[17] After reviewing the case, Mr. Portelance wrote to Mr. Michel Ouimet on Sunday, May 25, 2008, to advise him that he did not recommend that the grievance be sent to arbitration. He stated the following:

> I **do not recommend** that this grievance go to arbitration. The complainant, a probationary employee, was hired on June 11, 2007, and dismissed by the company on August 15, 2007, within the six months provided for in article 9.01(c). The company states that the complainant does not have the skills needed. What is of concern in this matter is that his manager admitted to him that he had been dismissed because he had filed a grievance. The problem we see is that the arbitrator will have to decide between the complainant's version of the facts and that of the manager. And even if the arbitrator believes the complainant, he will have to rule on whether or not the complainant actually has the skills needed. Case law relating to the dismissal of probationary employees has established that the grievance arbitrator must not interfere with the employer's decision unless it is shown that the company violated the charter, which is not the case here.
>
> (translation)

[18] Mr. Portelance testified that the grievance was an administrative grievance rather than a disciplinary one and that CEP had never won a grievance involving a probationary employee. This was his first case as a union representative that involved an employee on probation. He relied on his own research and did not request a legal opinion in the matter.

[19] On May 27, 2008, Mr. Ouimet informed Mr. Singer that CEP did not intend to pursue the arbitration procedure and, according to the by-laws, he had 90 days to appeal the decision.

[20] Mr. Singer testified that he had tried to reach the complainant twice, on May 30 and June 16, 2008. He stated that he had left messages in a voice mailbox asking the complainant to call him back. He had called the number indicated on the form entitled "Expertech Grievance Procedure Schedule" (translation). The evidence shows, however, that the number ending in 7830 had been

crossed out and replaced with the proper digits, 7339. He had not attempted to reach the complainant on his cell phone, the number of which was on the union's "Member Record" (translation). During cross-examination, the complainant testified that he had never received any such messages in the family telephone voice mailbox, which is used only by him and his parents. He testified that his parents had known that he was waiting for news from the union and any such messages would not have been erased.

[21] Mr. Singer testified that the fact that the complainant had not called him back had led him to believe that the complainant had lost interest. In his mind, the complainant's failure to return his calls meant that there was no longer a complainant and, consequently, no longer a grievance. Further, he stated that he could not see why he would have sent a letter to the complainant to inform him that the grievance was going to be withdrawn.

[22] On July 9, 2008, Mr. Singer asked Mr. Ouimet to put an end to the grievance procedures:

> This is to request that you end the procedures relating to the above-noted grievance. After a thorough study of the grievance, we find ourselves unable to carry on with the procedures despite the fact that the response obtained was unsatisfactory.
>
> (translation)

[23] When questioned by the Board about the words "thorough study" used in the letter, Mr. Singer stated that the letter was a form letter in which only the names and grievance numbers were changed.

[24] On July 16, 2008, CEP representative Denis Dufour informed the employer that he did not intend to proceed with the arbitration of seven grievances, including the complainant's grievance, and that the union was withdrawing those grievances.

[25] The complainant called the union to enquire about the progress of his case, although he does not recall the exact dates of such calls, other than the call to Mr. Ménard, on November 13, 2007. Mr. Ménard had allegedly told him that it generally took a year for an arbitration hearing date to be set. When he received no further news and more than a year had passed since the filing of the

grievance, the complainant, on his father's advice, sent Mr. Ménard a letter by registered mail on January 15, 2009, stating the following:

> Since I have not received any recent information concerning the grievance I filed in 2007, I am writing to obtain the latest information in this regard, that is, what stage has been reached and when I can expect to receive a final answer in this matter.
>
> I would like to thank you for all your efforts in this matter, which is very important to me, given that I did nothing wrong to warrant this situation.
>
> Sincerely...
>
> (translation)

[26] Mr. Ménard stated at the hearing that he had not known at that point that the grievance had been abandoned and he had not been consulted about the withdrawal of the grievance in July 2008.

[27] Mr. Ménard called the complainant a few days later and asked him to come by the office for more information. Mr. Ménard was unable to give the complainant a copy of his file. He allegedly told the complainant that a letter had been sent to him in the summer of 2008 to inform him of the situation. According to the evidence on file and the testimony heard, no such letter was ever sent or even existed.

[28] On February 16, 2009, the complainant sent another letter by registered mail to ask for a copy of his file, but this time, the letter was addressed to Mr. L'Heureux, the president of the local union. In that letter, he indicated that he needed the documents "to allow a lawyer to consider [his] recourse options before the Labour Relations Board" (translation).

[29] On February 18, 2009, Mr. L'Heureux sent the complainant the following information:

> Mr. Chénier, in response to your request received today, February 18, 2009, this is to inform you that you must make your request to the union's national office, given the stage that has been reached in the process. The representative of record for the Expertech bargaining unit is Mr. Alain Portelance. His contact information is as follows...
>
> (translation)

[30] On February 26, 2009, the complainant called Mr. Portelance to enquire about the progress of his case. According to the complainant's testimony, Mr. Portelance informed him that the grievance had not been "recommended for arbitration" (translation). He told the complainant that he had to make his request for a copy of his file in writing.

[31] In a letter dated March 2, 2009, sent to Mr. Portelance by registered mail, the complainant asked for a copy of his file "to allow a lawyer to consider [his] recourse options before the Canada Industrial Relations Board" (translation).

[32] On March 20, 2009, Mr. Portelance sent the complainant a copy of his file. On receipt of the documents, the complainant discovered that the grievance had been abandoned on July 16, 2008. According to the complainant's testimony, this was when he first learned of the date on which his grievance had been abandoned.

[33] In an email dated April 29, 2009, counsel for the complainant asked Mr. Portelance to send him the letter of July 2008 allegedly sent to the complainant to inform him that the grievance had been withdrawn, since the letter was not included in the documents sent on March 20, 2009.

[34] On May 1, 2009, Mr. Portelance responded by email that "what you have on file is what I have on file" (translation). The complaint was filed with the Board on June 2, 2009.

[35] In an exhibit entered into evidence on September 9, 2009, Mr. Denis Dufour indicated the following to the industrial relations officer responsible for this matter:

> After the grievance was filed, an investigation was undertaken by the members of the local union's grievance committee and sent to the union's national office, to the attention of Mr. Portelance. An analysis of the file and case law revealed that no arbitrator had ever allowed a grievance by a worker who had not completed the probationary period with Expertech, and the trend at arbitration is the same for all other industries. Consequently, it is for these reasons that the union decided not to pursue the matter at arbitration.
>
> ...
>
> Further, it must be taken into consideration that Mr. Chénier had worked fewer than 45 days, a compelling factor for the arbitrator.
>
> (translation)

III–Positions of the Parties

A–The Complainant

[36] With regard to timeliness, the complainant submits that his complaint of June 2, 2009, was filed within 90 days of his officially knowing about the abandonment of the grievance by the union. He submits that it is necessary to look at each of the facts proven and each of the exhibits filed to understand what really went on, and it was only in the days that followed receipt of his file, which had been sent to him by the union on March 20, 2009, that he was able to read the correspondence of July 16, 2008, and learn that the grievance had been withdrawn. Further, states the complainant, it was not until May 1, 2009, that Mr. Portelance informed his counsel that the complainant's file contained nothing other than the documents sent to him on March 20, 2009, in response to a request by his counsel made on April 29, 2009, for a copy of the letter allegedly sent to him in July 2008.

[37] The complainant is asking the Board to apply section 16(*m.1*) of the *Code* to extend the time limits for instituting a proceeding if it believes that the time may have started running in January or February 2009 when he sent his letters asking for information.

[38] With regard to the merits of the case, the complainant submits that the union breached its duty of fair representation by acting in a manner that was arbitrary and in bad faith toward him by failing in its duty to keep him informed, thereby denying him the opportunity to try to convince the union to change its decision and to appeal to the union's higher authorities.

[39] He alleges that the union acted arbitrarily and did not thoroughly study the grievance before withdrawing it. He argues that the ground given, that is, that he was a probationary employee, cannot justify withdrawing a grievance based on the law as it now exists and the union should have sought a legal opinion.

[40] The complainant argues that the lack of communication is a breach of the union's investigative process. He states that he was not informed of the decision to abandon the grievance and did not have the opportunity to try to convince the union of its merits.

[41] He also criticizes the union for misinforming him and using him to file a grievance with respect to the interpretation of the collective agreement regarding reimbursement for the cost of work boots when the union knew that he was on probation. He has difficulty understanding the union's position that he could file a grievance regarding reimbursement for the cost of work boots while on probation, but was not "entitled to file a grievance against dismissal for lack of suitability for the job" (translation).

[42] Further, the complainant submits that the union's duty is greater in the case of a layoff or dismissal and the decision to abandon the grievance was made without a thorough investigation. Additionally, the complainant faults the union for not even attempting to find out whether the ground for dismissal, relating to his skills, was the genuine reason, when even a cursory look at the situation would have clearly shown that he had not been dismissed for lack of suitability in the second week of his training.

[43] As a remedy, the complainant is asking that the time limits for referring the grievance to arbitration be waived to make such a referral possible, that the union be ordered to refer the grievance to arbitration, and that he be represented by counsel of his own choosing at the union's expense. Alternatively, he is claiming damages in the amount of $24,236 for lost income, in the event that the Board not be able to remedy the situation that caused him prejudice.

B–The Union

[44] The union is of the view that the Board must dismiss the complaint. It argues first that the complaint was untimely and also that there is no evidence of a breach of its duty of fair representation.

[45] It submits that the complainant was informed that the grievance had been abandoned in a telephone conversation with a union representative in January 2009 in response to a registered letter he had sent. He later had another telephone conversation, with Mr. L'Heureux, after sending him a letter on February 16, 2009, to ask for a copy of his file, including a letter allegedly sent to him in July 2008, and a copy of the collective agreement. As indicated in that letter, he wanted "to allow a lawyer to consider [his] recourse options before the Labour Relations Board" (translation).

[46] According to the union, the complainant knew at that time that the grievance had been abandoned. It points out that the complainant spoke to Mr. Portelance over the phone on February 26, 2009, and asked him, in a letter dated March 2, 2009, for a copy of his file, making reference to their earlier telephone conversation and also indicating that he wanted the information "to allow a lawyer to consider [his] recourse options before the Canada Labour Relations Board" (translation).

[47] The union submits that the application of section 16(*m.1*) of the *Code* to extend the time limit requires a very high burden of proof threshold and a look at the complainant's letters shows that he knew in January and February 2009 that the grievance had been abandoned, a fact made even clearer by his intention to have a lawyer consider his recourse options. The union is of the view that this complaint filed on June 2, 2009, was not filed within the 90-day time limit set out in the *Code*.

[48] With respect to the merits of the case, the union argues that it did not act in an arbitrary manner or in bad faith. There is absolutely nothing that the complainant can fault in its handling of the grievance, from its filing through to the recommendation made by Mr. Portelance on May 25, 2008, that the grievance not be referred to arbitration.

[49] The union argues that it exercised its discretion, taking into account the dismissal grievance's poor chances of succeeding given the administrative rather than disciplinary nature of the employer's decision.

[50] The union submits that it is not unusual for a grievance to be withdrawn where there is no longer any complainant to support it. It faults the complainant for failing to respond to telephone

messages and failing to cooperate. It is of the view that it did not act in an arbitrary manner or in bad faith even if it did not send the complainant a letter advising that the grievance might be abandoned.

[51] According to the union, an employee does not have an absolute right to arbitration, and it is up to the union to decide what will prompt it to challenge existing law and when it will do so.

[52] Counsel for the union argued that the union representatives bore no animosity toward the complainant. If the Board were to decide that the grievance should go to arbitration, there would be no need to have the union incur costs to retain outside counsel. Counsel argued that it was up to CEP to decide whether to have a union representative handle the grievance or have counsel argue the matter.

C–The Employer

[53] The employer did not call any witnesses or make any submissions at the hearing. It referred to the written submissions filed with the Board on September 30, 2009, and stated that the complainant had been dismissed as unsuitable.

[54] The employer submitted an excerpt from the collective agreement, that is, article 9.01(c) thereof, as well as the corporate policy respecting probation, which reads as follows:

> Expertech recognizes the first six months worked as a probationary period for both management and non-management employees unless otherwise indicated in the employment offer or in the collective agreement.
>
> During that period, Expertech or the new employee may terminate the employment relationship at any time without advance notice or, for unionized employees, as prescribed by the collective agreement.
>
> The supervisor will assess performance during and prior to the end of the probationary period to determine whether the probationary period was successfully completed. The supervisor will consult with Human Resources concerning the final decision.
>
> (translation)

IV–Analysis and Decision

A–Applicable Law

[55] The complaint in this matter was filed pursuant to section 37 of the *Code*, which states the following:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[56] In *Canadian Merchant Service Guild* v. *Gagnon et al.*, [1984] 1 S.C.R. 509, the Supreme Court of Canada set out the principles relating to a union's duty of fair representation:

> 1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
>
> 2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
>
> 3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
>
> 4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
>
> 5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.
>
> (page 527)

[57] The complainant alleges that the union acted in an arbitrary manner and in bad faith. In *Noël* v. *Société d'énergie de la Baie James*, 2001 SCC 39; [2001] 2 S.C.R. 207, the Supreme Court defined the notion of arbitrary conduct as follows:

> [50] ... The inclusion of arbitrary conduct means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. ...

[58] In *Virginia McRaeJackson*, 2004 CIRB 290, the Board stated the following with regard to arbitrariness and bad faith:

> [27] A union must not act in bad faith; that is, with improper purpose. Three examples of this conduct include: the personal feelings of union officers influencing whether or not a grievance should be pursued; conspiring with the employer to have an employee disciplined or terminated; or, putting the ambitions of a group of employees who support a union official ahead of the interests of an individual employee.
>
> ...
>
> [29] A union must not act arbitrarily. Arbitrariness refers to actions of the union that have no objective or reasonable explanation, that put blind trust in the employer's arguments or that fail to determine whether the issues raised by its members have a factual or legal basis (see *John Presseault*, *supra*, but see *Orna Monica Sheobaran*, [1999] CIRB no. 10, that upheld a complaint where the union referred an employee to the employer rather than assist the employee; and *Clive Winston Henderson*, *supra*, where the union's decision jeopardized an employee's seniority).
>
> [30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. It is arbitrary not to investigate and discover the circumstances surrounding the grievance. Failure to make a reasonable assessment of the case may amount to arbitrary conduct by the union (see *Nicholas Mikedis* (1995), 98 di 72 (CLRB no. 1126), appeal to F.C.A. dismissed in *Seafarers' International Union of Canada* v. *Nicholas Mikedis et al.*, judgment rendered from the bench, no. A-461-95, January 11, 1996 (F.C.A.)). A non-caring attitude towards the employee's interests may be considered arbitrary conduct (see *Vergel Bugay et al.*, *supra*) as may be gross negligence and reckless disregard for the employee's interests (see *William Campbell*, [1999] CIRB no. 8).

[59] In that matter, the Board stated the following regarding cases of dismissal:

> [31] The union's duty in this regard is open to greater scrutiny when a matter involves an employee's termination, serious discipline that affects gainful employment or a disability that requires accommodation. On the other hand, not every grievance warrants an investigation. In some circumstances, the union may already be in possession of the relevant information. Where the evidence before the union is that a grievance is unlikely to succeed, it may be unreasonable in certain circumstances to expect the union to investigate new evidence brought forth by the employee (see *International Longshore and Warehouse Union, Ship and Dock Foremen, Local 514* v. *Empire International Stevedores Ltd.*, [2000] F.C.J. No. 1929 (QL) reversing Board's decisions *William Bill Harris*, April 3, 2000 (CIRB LD 209); and *William (Bill) Harris*, [1999] CIRB no. 43; and 57 CLRBR (2d) 216, application for leave to appeal to the S.C.C. dismissed).
>
> (*Virginia McRaeJackson*, *supra*)

[60] Additionally, the Board stated that the union had fulfilled its duty of fair representation

> [37] ... if: a) it investigated the grievance, obtained full details of the case, including the employee's side of the story; b) it put its mind to the merits of the claim; c) it made a reasoned judgment about the

> outcome of the grievance; and d) it advised the employee of the reasons for its decision not to pursue the grievance or refer it to arbitration.
>
> (*Virginia McRae Jackson, supra*)

[61] The Board also stated that the union is not required to obtain a legal opinion:

> [38] Established unions usually have their own experienced staff to conduct investigations, assess the grievance and decide whether or not to pursue a grievance. Although the union may decide to obtain the advice of legal counsel, there is no requirement for the union to obtain a legal opinion before deciding not to refer a grievance to arbitration. The Board will not uphold a complaint based on the mere fact that the union did not obtain legal advice before deciding not to refer a grievance to arbitration, or that the union did not follow counsel's advice.
>
> (*Virginia McRae Jackson, supra*)

[62] However, although the union is not required to seek a legal opinion, this factor, among others, must be taken into account, as indicated in *Orville Riley*, 2008 CIRB 419:

> [67] ... This also includes the fact that the union did not seek any legal advice on the merits of the grievance, although the contested provisions had never been arbitrated, that it did not provide the complainants or their counsel with an opportunity to have any input prior to a decision being made and that it relied on the fact that it had filed other proceedings to justify withdrawing the grievance.

[63] The time limit for filing a duty of fair representation complaint is governed by section 97(2) of the *Code*, which reads as follows:

> 97.(2) Subject to subsections (4) and (5), a complaint pursuant to subsection (1) must be made to the Board not later than ninety days after the date on which the complainant knew, or in the opinion of the Board ought to have known, of the action or circumstances giving rise to the complaint.

[64] Section 16(*m.1*) gives the Board the following power:

> 16. ...
>
> (*m.1*) to extend the time limits set out in this Part for instituting a proceeding.

[65] The applicable collective agreement in this matter contains the following provisions respecting probationary employees:

> 9.01 (c) "Probationary Employee"
>
> An employee shall be considered to be a probationary employee until he has been continuously employed by the Company for six months.
>
> Notwithstanding Article 13 of this Agreement, the Company retains the right to terminate the employment of a probationary employee who is found by the Company to be unsuitable. Such a termination shall be subject to the grievance and arbitration procedures set forth herein.
>
> The Company agrees to give the employee and his Steward a copy of the notice of termination, which shall contain the reasons why, in the opinion of the Company, the employee is found to be unsuitable.

[66] Section 57(1) of the *Code* requires that every collective agreement contain a provision for final and binding settlement of differences:

> 57.(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

[67] In this regard, the Board refers the parties to its decisions in *Bernard LeBrun* (1994), 94 di 67 (CLRB no. 1066); and *Patrice Lafontaine*, 2003 CIRB 217.

[68] Current case law also recognizes that probationary employees have the right to arbitration in the event of wrongful dismissal. The employer has the right to dismiss a probationary employee who does not perform the duties of the position to its satisfaction, but if the employer's decision is unwarranted, it may be challenged. An employer cannot hide behind a clause prohibiting recourse to grievances for probationary employees where there has been bad faith or it has acted illegally, wrongfully or arbitrarily (see *Parry Sound (District) Social Services Administration Board* v. *O.P.S.E.U., Local 324*, 2003 SCC 42; [2003] 2 S.C.R. 157). Labour law currently recognizes the right of all employees, whether permanent or on probation, to be treated fairly and in good faith by their employer (see *Cabiakman* v. *Industrial Alliance Life Insurance Co.*, 2004 SCC 55; [2004] 3 S.C.R. 195; *McKinley* v. *BC Tel*, 2001 SCC 38; [2001] 2 S.C.R. 161; and *Wallace* v. *United Grain Growers Ltd.*, [1997] 3 S.C.R. 701).

B–Decision

1–Timeliness

[69] With respect to the issue of timeliness raised by the union, to the effect that the complainant failed to respect the 90-day time limit under section 97(2) of the *Code*, the Board must begin by analyzing the evidence in this regard and applying any principles established in case law with regard to section 16(*m.1*) of the *Code*.

[70] The complaint was filed on June 2, 2009, which means that the date in respect of the time limit was around March 5, 2009. On the advice of his father, given that the grievance had been filed more than a year before, the complainant wrote to the union on January 15, 2009, and used the opportunity to thank the union for all of its efforts in relation to the matter. He could really not have known then what had transpired in his case. A few days later, Mr. Ménard called the complainant to ask him to come to the office and indicated that he had been sent a letter in the summer of 2008.

[71] On February 16, 2009, the complainant sent Mr. L'Heureux a letter asking for a copy of his file and indicating that he needed it in order to have a lawyer consider recourse options. He specifically asked for a copy of the letter allegedly sent to him in the summer of 2008. Mr. L'Heureux answered that he would have to contact Mr. Portelance.

[72] On February 26, 2009, the complainant called Mr. Portelance to enquire about the progress of his case. Mr. Portelance allegedly told him at that time that the grievance had not been "recommended for arbitration" (translation) and indicated that if he wanted a copy of his file, he would have to make the request in writing, which the complainant did on March 2, 2009. In that letter, the complainant indicated that he needed a copy of his file to allow a lawyer to consider his options.

[73] On March 20, 2009, Mr. Portelance mailed the complainant a copy of his file. On receipt of the documents, the complainant discovered that the grievance had been abandoned on July 16, 2008; this was the first the complainant knew of the date when the grievance had been abandoned.

[74] In an email dated April 29, 2009, counsel for the complainant asked Mr. Portelance for a copy of the letter of July 2008 allegedly sent to the complainant, since it was not among the documents sent to the complainant. On May 1, 2009, Mr. Portelance responded that there were no other documents on file. The complaint, to which was appended all the documents received by the complainant from the union, was filed on June 2, 2009.

[75] Under these circumstances, the Board cannot accept this first defence based on untimeliness. The Board can accept that the complainant was informed of a problem with the grievance, but it is very difficult to determine when this occurred based on the evidence. The complainant wrote to Mr. Ménard on January 15, 2009, to enquire about his case, and even thanked the union for its efforts. At that point in time, Mr. Ménard did not even know that the grievance had been abandoned. A few days later, he called the complainant and told him that he had been sent a letter in July 2008. The evidence shows that there was no such letter. The complainant was unable to obtain a copy of his file from Mr. Ménard. He had to contact Mr. L'Heureux, which he did on February 16, 2009. The latter responded on February 18, 2009, that he had to send his request to the national office "given the stage that has been reached in the process" (translation).

[76] On February 26, 2009, the complainant called Mr. Portelance, who allegedly informed him that the grievance had not been "recommended for arbitration" (translation) and that, if he wanted a copy of his file, he would have to make the request in writing, which the complainant did on March 2, 2009. The file was not sent to him until March 20, 2009, and did not contain the letter allegedly sent to him in the summer of 2008. At that point, the complainant still did not know that there had never been such a letter. Had such a letter existed, the complainant would surely have taken it into account when deciding about filing a complaint. Counsel for the complainant requested a copy of the letter on April 29. On May 1, 2009, Mr. Portelance responded that there was nothing else on file. The complaint was filed on June 2, 2009.

[77] The Board considers that the dates that must be taken into consideration for starting the 90-day time limit are March 20, 2009, and the days that followed, when the complainant received his file, regardless of the exact dates. The evidence shows that the complainant learned that his grievance had not been "recommended for arbitration" (translation) in a telephone conversation with Mr. Portelance on February 26, 2009. However, he had not actually received any documents in that

regard. Further, he was told that he had been sent a letter in the summer of 2008 to inform him that the grievance had been withdrawn.

[78] The Board will not rule on the complaint on the basis of timeliness. How, under these circumstances, could the Board justify imposing a 90-day time limit on the complainant starting on February 26, 2009, when he was told that the grievance had not been "recommended for arbitration" (translation), when he had no file on hand and, further, when Mr. L'Heureux had written to him on February 18, 2009, stating what is set out in paragraph 75?

[79] The Board finds that the complaint was filed within the time limit set out in the *Code* and, even if the complainant had gone over the time limit by a few days, the Board would have exercised its discretion under section 16(*m.1*) of the *Code* to extend the limit based on the criteria established by jurisprudence, such as the rights of the parties, the objectives of the *Code*, the length of the delay, the circumstances of the delay, and the merits of the case (see *Raynald Pinel*, 1999 CIRB 19; *Winfield Porter*, 2002 CIRB 176; and *Louise Galarneau*, 2003 CIRB 239). This defence is therefore dismissed.

2–Breach of the Duty of Fair Representation

[80] In *Tremblay* v. *Syndicat des employées et employés professionnels-les et de bureau, section locale 57*, 2002 SCC 44; [2002] 2 S.C.R. 627, the Supreme Court of Canada stated that "[t]he duty of representation owed by the union as a general rule constitutes an obligation of means." Further, case law has recognized that the conduct of a union must be considered according to the criteria established by the Supreme Court (see *Canadian Merchant Service Guild* v. *Gagnon et al.*, *supra*). Although the Court stated that the right to take a grievance to arbitration is reserved to the union, that the union enjoys considerable discretion in this regard, and that the employee has no absolute right to arbitration, the fact remains that the decision must not be arbitrary, capricious, wrongful or discriminatory. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and its consequences for the employee. The representation by the union must be undertaken with integrity and competence.

[81] The complainant cited three grounds in support of his complaint. He alleged that the union had acted in an arbitration manner and in bad faith in deciding to abandon his grievance. He also alleged that the union's lack of communication had deprived him of his right to appeal to the union's higher authorities.

[82] In *Noël* v. *Société d'énergie de la Baie James*, *supra*, the Supreme Court of Canada observed that the legislation "imposes a duty on it to perform its representative function properly" and that "[t]his duty prohibits four types of conduct: bad faith, discrimination, arbitrary conduct and serious negligence." The Court stated (at paragraph 48) that acting in bad faith "presumes intent to harm or malicious, fraudulent, spiteful or hostile conduct." It indicated that the concept of arbitrariness

> 50 ... means that even where there is no intent to harm, the union may not process an employee's complaint in a superficial or careless manner. It must investigate the complaint, review the relevant facts or seek whatever advice may be necessary; however, the employee is not entitled to the most thorough investigation possible. ...

[83] Applying these principles to the matter here clearly shows that the ground of bad faith alleged against the union cannot be accepted. The Board finds no intent to harm nor any malicious, fraudulent, spiteful or hostile conduct by the union toward the complainant.

[84] However, with regard to the arbitrary conduct alleged against the union, the Board notes a certain lapse in this regard. Although it was not the union's intent to harm the complainant, its handling of the grievance starting on May 25, 2008, was superficial and careless, and the union failed to perform a necessary consultation on the state of the law respecting probationary employees and to take into account the provisions of the collective agreement and of the employer's policy respecting probationary periods.

[85] On January 8, 2008, Mr. Portelance wrote to Mr. Ménard, the chief steward for the local union, who was also responsible for grievances at the first level of the grievance procedure, to convey the employer's response of January 2, 2008, dismissing the grievance. He asked him for his position in regard to proceeding with the matter because, as indicated at the hearing, it is the local union that decides whether or not to continue to pursue a grievance.

[86] On January 23, 2008, Mr. François Singer, the executive vice-president of CEP, Local 8284, with the employer, asked Mr. Michel Ouimet, the vice-president of CEP-Quebec, to initiate the expedited arbitration procedure, and sent a copy of his request to Mr. L'Heureux, the president of the local union, and to Mr. Portelance. On January 29, 2008, Mr. Portelance sent the employer representative a notice of arbitration along with the names of three potential arbitrators. At the hearing, he indicated that this was standard procedure in all cases.

[87] Contrary to what Mr. Portelance indicated at the hearing with respect to the decision as to whether or not to proceed further with a grievance, a decision that falls to the local union, it was Mr. Portelance himself who, on May 25, 2008, "[no longer] recommended the grievance for arbitration" (translation), stating the following, as already set out in paragraph 17:

> ... What is of concern in this matter is that his manager admitted to him that he had been dismissed because he had filed a grievance. The problem we see is that the arbitrator will have to decide between the complainant's version of the facts and that of the manager. And even if the arbitrator believes the complainant, he will have to rule on whether or not the complainant actually has the skills needed...
>
> (translation)

[88] It is indeed up to the arbitrator to weigh and decide between the different versions of a fact, but what is of greatest concern is that, even if the arbitrator gives credence to the complainant, he will have to rule on whether or not the complainant has the skills needed. However, that is not the case where the dismissal is an administrative dismissal. All that the arbitrator is called on to decide is whether the reason for dismissal is the genuine reason or a pretext. It is not the arbitrator's responsibility to assess whether or not the complainant has the necessary skills, since such assessment is left to the employer.

[89] In the same letter, Mr. Portelance states the following:

> ... Case law relating to the dismissal of probationary employees has established that the grievance arbitrator must not interfere with the employer's decision unless it is shown that the company violated the charter, which is not the case here.
>
> (translation)

[90] But this statement does not apply solely to probationary employees, but to all employees in cases of administrative dismissal. The arbitrator must determine whether the reason given for the dismissal is genuine and, if it is, the arbitrator may not intervene to rescind or amend the employer's decision.

[91] As indicated earlier, labour law now recognizes the right of all employees, whether permanent or on probation, to be treated fairly and in good faith by the employer. In the complainant's case, he was entitled to grieve a dismissal pursuant to article 9.01(c) of the collective agreement. Through that article, the employer merely reserved the right to terminate a probationary employee deemed to be unsuitable. The employer entered into evidence an excerpt from its policy respecting the six-month probationary period, which reads as follows:

> ...
>
> During that period, Expertech or the new employee may terminate the employment relationship at any time without advance notice or, for unionized employees, as prescribed by the collective agreement.
>
> The supervisor will assess performance during and prior to the end of the probationary period to determine whether the probationary period was successfully completed...
>
> (translation)

[92] The complainant was dismissed on August 15, 2007, that is, in his second week of training, after being hired on June 11, 2007. His performance was not assessed or, at least, the employer did not give him or the union an assessment. He filed a grievance in July 2007 regarding reimbursement for the cost of work boots on the advice on the union president; that grievance was allowed by the employer in December 2007. In exercising its discretion to decide whether or not to pursue the grievance, the union was required to analyze the case according to the latest labour law criteria. This is a case where, given all of the circumstances of the matter, the grievance arbitrator would have had to decide whether the reason given by the employer, that is, the complainant's skills, was the genuine reason for dismissal rather than a pretext, but would not have been required to rule on the said skills, since such an assessment is left to the employer.

[93] Mr. Portelance also testified that CEP had never been successful in grieving cases involving probationary employees, that he had relied on his own research and had not sought a legal opinion.

Additionally, it was his first case involving a probationary employee since becoming a union representative. Yet the case law to which he referred was an interlocutory arbitral award dated August 30, 2001, in which the arbitrator ruled solely on the issue of whether or not the employee concerned had still been on probation on the day his employment had been terminated. As indicated earlier, the union was not required to ask for a legal opinion, but given the circumstances in this matter, the Board must take this fact into account in considering whether the union's conduct was arbitrary. A legal opinion might have provided the union with information as to the current state of the law and the role of the arbitrator in such a case.

[94] The course of events shows a total lack of communication with the complainant. On May 27, 2008, Mr. Ouimet informed Mr. Singer that the union did not intend to pursue the arbitration procedure and that, under the by-laws, he had 90 days, that is, until around August 27, 2008, to appeal the decision. As indicated in paragraph 20, Mr. Singer allegedly left two messages on the complainant's telephone voice box, on May 30 and June 16, 2008, after calling the telephone number indicated on the "Expertech Grievance Procedure Schedule" (translation) form, which was however crossed out and replaced with the proper number, according to the evidence on file. He did not attempt to reach him on his cell phone, the number for which was indicated on the union's "Member Record" (translation). He did not send him a letter, and he testified that he failed to see why he would have sent him one to tell him that the grievance was to be withdrawn. In Mr. Singer's view, the fact that the complainant had not returned his calls meant that there was no longer a complainant and, thus, no longer a grievance.

[95] On July 9, 2008, Mr. Singer asked Mr. Ouimet to terminate the grievance procedure, as indicated in paragraph 22. At the hearing, Mr. Singer indicated that the words "thorough study" that had been used were part of a form letter in which only the names and grievance numbers had been changed. On July 16, 2008, the union informed the employer that it was withdrawing the grievance, that is, prior to the end of the 90-day period during which the complainant could have raised arguments to try to convince the union to change its decision. He learned that the grievance had been withdrawn on July 16, 2008, in the days following March 20, 2009, when he received the documents from the union.

[96] A lack of communication is not *per se* a violation of a union's duty of fair representation unless it prejudices the complainant. However, it is something that the Board must take into account in properly assessing a union's conduct. In *Jean L'Hébreux*, 2010 CIRB 515, the Board stated the following:

> [37] The weight of the Board's jurisprudence has established that a failure or lack of communication between a union and a member is not a violation of the union's duty of fair representation per se (see *William Campbell*, 1999 CIRB 8). However, a violation of section 37 can exist if the lack of communication prejudices the employee (see *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550)).
>
> [38] In *Robert Adams*, 2001 CIRB 121, the Board stated the following:
>
> "[47] Previous decisions of the Board have found that, while lack of communication on its own does not usually constitute a violation of the *Code*, it can, when it prejudices a complainant.
>
> [48] In *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), the Board pointed out the following:
>
> 'Although the lack of communication between the union and Brideau in the instant case did not result in a violation of section [37], this does not mean that the Board does not consider communication to be an element that can never give rise to a section [37] violation.
>
> In handling a grievance and dealing with the employer, it is incumbent on the union to ascertain, from all necessary sources, the facts giving rise to the grievance. These facts can be elicited from either the grievor, other persons knowledgeable about the incident ... or documentary evidence.
>
> ...
>
> Thus, there is no obligation to communicate with the grievor, but if the lack of communication results in a situation which prejudices the position of the grievor, then that omission can result in a violation of section [37].
>
> (pages 239-240; 269-270; and 14,109)'
>
> [49] In *Luc Gagnon* (1992), 88 di 52 (CLRB no. 939):
>
> **'We share this view. In fact, if the Board concluded that poor communication between a union and an employee did not constitute generally a violation of section 37, it is mainly because it had determined, rightly in these cases that the union's conduct in the actual processing of the grievance still met the minimum requirements of the *Code*.**
>
> **In conclusion, past Board decisions reveal that if a lack of communication "is not per se a violation of a union's duty of fair representation" (*Clarence R. Young* (1989), 78 di 117 (CLRB no. 753), page 121), it is nevertheless a factor the Board must often take into account in properly assessing a union's conduct.**
>
> (page 71; emphasis added)'
>
> [50] The original panel found that the lack of communication was of such a degree that it prejudiced the complainant's position, and that it also constituted further evidence of the arbitrariness of the union's actions. Such a conclusion is reasonable and we cannot disagree."

[97] In *Barbara Pepper*, 2009 CIRB 453, the Board also stated the following:

> [40] Ineffective communications between a union and a member often precipitate duty of fair representation complaints before the Board. However, poor communication is not in itself a basis for a successful duty of fair representation complaint (see *William Campbell*, 1999 CIRB 8). As the Board noted in *Jacqueline Brideau* (1986), 63 di 215; 12 CLRBR (NS) 245; and 86 CLLC 16,012 (CLRB no. 550), it is when the lack of communication results in a situation that prejudices the position of the grievor that the omission can result in a violation of section 37.

[98] In *Josée Trudeau*, 2010 CIRB 541, the Board further stated the following:

> [47] In *Virginia McRaeJackson*, 2004 CIRB 290, the Board stated the following regarding the duty of fair representation:
>
> "[6] The duty of fair representation exists as a counterpart to the union's exclusive authority to deal with grievances under the collective agreement.
>
> ...
>
> [9] The union's authority to deal with grievances is counterbalanced by the duty provided under the *Code* to treat all members of a bargaining unit fairly. This is what is known as the **duty of fair representation**. This duty is described in the *Code* as follows:
>
> '37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.'
>
> (emphasis in original)"
>
> [48] The Board has addressed the issue of lack of communication as it relates to the duty of fair representation in numerous decisions. According to the general principle that emerges from the Board's case law in this regard, a **lack of communication per se does not constitute a violation of the *Code*, except where it prejudices the complainant**.
>
> (emphasis in original)

[99] In *Virginia McRaeJackson, supra*, it also indicated the following:

> [40] The union has carriage of the grievance and does not need to consult with the employee at every stage of the grievance procedure, although it may be advisable to communicate with the employee if a grievance or arbitration hearing is delayed, in order to avoid a complaint under section 37 (see *Ghislaine Gagné, supra*). Lack of communication per se does not constitute a violation of the *Code*, except where it prejudices the complainant (see *Crewdson* (1992), 93 CLLC 16,014 (CLRB decision no. 977) (decision subsequently rescinded following parties' agreement); *William Campbell, supra*; and *Robert Adams, supra*).

[100] In the instant matter, the complainant really did face a lack of communication on the part of the union and the fact that he was deprived of the opportunity to convince the union to change its decision during the period allowed for in the appeal procedure contained in the union's by-laws did prejudice his position. In *Orville Riley*, *supra*, the Board stated the following:

> [66] ... At the very least, if the complainants or their counsel had been kept informed, as requested, they would have had the opportunity to try to convince the union to maintain their grievance.
>
> [67] ... This also includes the fact that the union did not seek any legal advice on the merits of the grievance, although the contested provisions had never been arbitrated, that it did not provide the complainants or their counsel with an opportunity to have any input prior to a decision being made and that it relied on the fact that it had filed other proceedings to justify withdrawing the grievance.

V–Conclusion

[101] In the instant matter, given the circumstances recounted above, the Board finds that the union breached its duty of fair representation by withdrawing the complainant's grievance without making a sufficient assessment of whether the grievance had a factual or legal basis to succeed, thus acting in an arbitrary manner. This includes the fact that the union did not deem it appropriate to seek a legal opinion concerning the rights of a probationary employee, the current state of case law in this regard, or the power of the grievance arbitrator to rule on an employee's skills in a case of administrative dismissal.

[102] Additionally, as a result of its lack of communication, the union deprived the complainant of the opportunity to convince it to change its decision in the 90 days provided for appeals under the union's by-laws before the decision was made.

[103] With respect to the damages claimed by the complainant in the alternative should the Board refuse to order that the grievance be referred to arbitration, the Board is unable to acquiesce to this request given the finding at which it has arrived. Allowing the request as formulated would be ruling *ultra petita*.

[104] Accordingly, the Board orders

A – that the union immediately refer the complainant's grievance no. X82-085-D filed on August 31, 2007, to arbitration;

B – that the time limits in the collective agreement in respect of the referral of the grievance to arbitration be waived;

C – that the union retain the services of labour counsel of its own choosing to argue the grievance, given that the Board did not note any bad faith toward the complainant in this matter, nor any animosity at the hearing, and it is satisfied that the complainant will be represented competently and with integrity.

[105] The Board retains jurisdiction over any question that might arise in the implementation of this decision and appoints Ms. Lucie Lafontaine, Labour Relations Officer, to assist the parties as required.

Translation

Claude Roy
Vice-Chairperson